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Backgrounder

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Common Market Proposal Would Enshrine Internal Trade Barriers in Canada's Constitution

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From the beginning of Canada's current constitutional debate, many observers, including the C.D. Howe Institute, have argued that the Canadian economic union should be strengthened by modernizing section 121 — the "common market clause" — of the 1867 Constitution. The existing clause merely forbids tariffs on interprovincial trade in goods. It does not address numerous barriers based on province or territory of origin that impede trade in goods within the country, nor does it cover similar discriminatory practices affecting the interprovincial movement of labor, services, and capital.

Removing discriminatory barriers to trade among Canadians would lower costs for consumers, benefit taxpayers via lower costs for government purchases, increase the competitiveness of Canadian businesses, and thus improve the prospects for sustainable employment growth and full participation by all Canadians in the national economy. It would strengthen the economic union at a time when trade barriers between Canada and the rest of the world are also coming down — sometimes to the point where fellow Canadians are treated less favorably than foreigners.

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Many Canadians have expressed the fear that decentralization of economic power in Canada, as a result of the growing fiscal weight of the provinces and possible shifts in federal and provincial responsibilities, would result in a more fragmented economic union. A strengthened section 121 would be a powerful antidote to such a trend.

Delegates to the Multilateral Meetings on the Constitution have given tentative support to a proposal, made public by the federal government on July 16, 1992, to recast the current section 121. But this proposal — far from limiting discriminatory internal barriers — would provide existing barriers with constitutional protection, and might encourage a wide range of new ones.

The salient features of the new proposal

The proposed new section 121 would prohibit trade barriers that result from arbitrary discrimination (in "law or practice") on the basis of province or territory of residence, origin, or destination. Such barriers would, however, have to "unduly impede the efficient functioning of the economic union" to be invalidated. The proposal provides for the settling

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of challenges to federal or provincial laws and practices by an agency that would attempt to mediate and conciliate. When necessary, cases would proceed to a special tribunal empowered to make final determinations.

The proposal also contains a lengthy and detailed list of exemptions to the general provision. In addition to measures related to public security, safety, and health, environmental protection and consumer protection — already a very broad range of government activity — a number of practices would not be invalidated under the new section 121, whether they discriminate among Canadians or not and no matter how much they actually impede trade among the provinces. These exceptions include measures affecting the provision of social services, restrictions on acquisition of land by out-of-province residents, establishment of monopolies, marketing, and supply-management systems, regulation of labor markets, protection of artistic and historic articles, "reasonable" public sector investment practices, and subsidies or tax incentives for the purpose of encouraging investment.

The proposal also states that the prohibition of discriminatory barriers should not in any way extend to policies of equalization and regional development, or policies to reduce economic disparities within a province. An additional clause provides that the new section 121 not restrict the personal mobility rights existing under Section 6 of the Charter of Rights and Freedoms.

The positive features of the proposal

The proposed new section 121 contains the seeds of some improvement over both the existing common market clause and some other proposals that have been made during the past year.

For example, it implicitly covers persons, services, and capital, rather than just goods as is currently the case. It also focuses on arbitrary discriminatory barriers to trade, rather than on the broader (and more controversial) economic notion of free mobility of goods, services, persons, and capital. Importantly, the proposal would prohibit discriminatory barriers by both the provinces and the federal government. (An earlier proposal had said section 121 should not render invalid a "law ...declared by Parliament to be in the national interest," which some criticized as being a federal "power grab"; such criticism would no longer be valid.)

The establishment of a dispute settlement mechanism, culminating if necessary in binding decisions made by a special tribunal, would allow trade and other experts greater latitude in balancing the policy objectives of governments against the economic costs of a given barrier.

Governments would be given until 1996 to adjust their existing legislation to conform with the new common market clause. Thus, there would be time to modify any law or policy that has incidental discriminatory effects in a way that achieves the same policy objectives without contravening the section.

Flaws in the proposal

While it is clear that the list of exemptions stems from justifiable concerns that every policy that is not market oriented will be construed as a trade barrier, its effect will be to swing the pendulum too far in the opposite direction. Under the proposal, any policy that governments declare to be for a purpose listed in the exemptions will be protected, even if it arbitrarily discriminates among Canadians and imposes significant costs on the economy.

This list of explicit exemptions could also become an excuse for governments to impede progress toward the mutual recognition or even harmonization of provincial standards (regarding products and services, professions, the environment, and so on), the lack of which is a major impediment to trade and the pursuit of employment across provinces.

Furthermore, the requirement to demonstrate that a barrier unduly impedes the efficient functioning of the economic union before it can be struck down rules out cases where discriminatory barriers may impede an individual from earning a living, or a company from doing business, while only slightly hurting the national economy. (Using instead the criterion of significant damage to an industry rather than to the national economy as a whole would be more in line with international practice in the adjudication of trade disputes.)

Overall, these defects are serious enough to overwhelm any positive features of the proposal. They make the proposed section 121 not only useless but harmful, giving governments a legal basis

for erecting more impediments to internal trade than already exist. It is not surprising that the drafters felt it necessary to protect the mobility rights guaranteed by the Charter of Rights and Freedoms from the restrictions allowed by this proposal!

Why the exemptions?

The concerns of some provinces that a new common market clause should not prevent the pursuit of legitimate goals is understandable. This is particularly true given the history of proposed new wordings for section 121, which have focused on economic efficiency and "mobility rights." Anything that could conceivably impede mobility could have fallen under such wording, resulting in demands for exemptions. The new proposal for section 121, however, contains two provisions that address these concerns.

First, the new proposal focuses on discriminatory practices affecting trade. It does not guarantee free movement. Thus, any law or practice that affects the commercial or employment conditions of provincial and out-of province residents equally — for example, the setting up of provincial monopolies, residence requirements for property ownership, and protection of historic artifacts — would not be considered an unconstitutional barrier to trade under the proposal.

Second, a discriminatory measure could be struck down only if it was found to be "arbitrary," which, in effect, establishes a test of reasonableness regarding the discriminatory content of any policy. If there are no other ways to obtain the desired objective than to discriminate against out-of-province residents, the discrimination would not be considered "arbitrary" and the policy would be allowed to stand.

Given these safeguards, the list of exemptions is unnecessary and potentially damaging. Rather than establishing a framework for economic relations among Canadians, as constitutionmakers should limit themselves to doing, these exemptions could entrench policies that would disadvantage Canadians for the next century.

Conclusion

A greater effort should be made to explain to Canadians that a strengthened economic union need not threaten legitimate provincial interests, and that it would instead enhance the Canadians' ability to pursue freely their economic well-being.

The common market clause should be shorter and should stick to general principles. Rather than including a list of exemptions, the clause should address legitimate concerns by making it clear that the only policies that would be struck down would be those whose discriminatory impact was out of proportion to their other objectives and whose legitimate objectives could be met in less discriminatory ways.

If governments are determined to maintain internal trade barriers, it would be less damaging to provide an explicit escape clause than to water down the general protection of Canadians against arbitrary discrimination. One option would be to allow First Ministers to agree, subject to a specific voting formula, to maintain a given restriction despite section 121. Alternatively, a "notwithstanding" clause, subject to five-year renewal — like that affecting the Charter of Rights and Freedoms — could be included in section 121.

If changes along these lines cannot be made, however, Canada would be better off with the existing, outdated common market clause than with the proposal that now exists.

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